NO. 47588-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

FLOYDALE L. ECKLES, JR.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 14-1-01149-9

BRIEF OF RESPONDENT

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SERVICE		
	Dana M. Nelson 1908 E Madison Street Seattle, Wa 98122-2842 Email: nielsenc@nwattorney.net	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED December 8, 2015, Port Orchard, WA  **Original e-filed at the Court of Appeals; Copy to counsel listed at left.** **Office ID #91103 kcpa@co.kitsap.wa.us**

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a. Whether that issue was preserved for appeal.

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a. Whether that issue was preserved for appeal.

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a. Whether those issue were preserved for appeal.

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Floydale L. Eckles, Jr. was charged by information filed in Kitsap County Superior Court with one count of rape of a child in the second degree. CP 1. Later, a first amended information was filed charging two counts (counts I and II) of rape of a child in the second degree, one count (count III) of rape of a child in the third degree, one count (count IV) of attempted child rape in the third degree, and one count (count V) of child molestation in the third degree. CP 8. Counts I, II, and II named KKT as the victim; counts IV and v. named KBR as the victim.

On February 2, 2015, Eckles waived jury. CP 16. On February 17, 2015, the trial court found Eckles guilty of counts I, II, III, and IV, acquitting on count V. RP (2/17/15) 276-78. Findings of fact and conclusions of law for hearing on bench trial were entered on March 11, 2015. CP 35. These findings and conclusions are not challenged in this appeal.

Sentencing was done on March 11, 2015. CP 42; RP (3/11/15). Eckles was sentenced to a concurrent minimum term of 210 months and a maximum term of life. CP 43-44. Further, Eckles is subject to community custody for life on counts I and II. CP 45. Various conditions attend this community custody. Among these conditions, that

Eckles "possess/access no pornography, sexually explicit materials, and/or information pertaining to minors via computer (i.e., internet)" and that Eckles "enter no bar or place where alcohol is the chief item of sale" are conditions imposed on the face of the judgment and sentence. CP 47. And, the judgment and sentence incorporates conditions recommended in a pre-sentence investigation (PSI). Id. These additional conditions (although many duplicate the conditions found in the judgement and sentence) were further ordered by the trial court's signature on Appendix H. CP 54. Among these is the condition that Eckles "shall not possess tracking equipment." CP 56.

The PSI conditions are derived from a second PSI that was filed in the matter. Seems that the first PSI was inaccurate as to some material facts. RP (3/11/15) 4-5. The first, along with suggested additional conditions denominated Appendix F, was filed March 9, 2015. CP 59. The second PSI was filed March 11, 2015 under a letter from the Department of Corrections (DOC) indicating that this second PSI was "REVISED" and was intended to replace the first permutation. CP 23. The second PSI refers to conditions of supervision as found in Appendix H. CP 33. As noted, Appendix H (not F) constitutes the additional conditions adopted by the trial court. CP 54; RP (3/11/15) 42.

B. FACTS

Eckles does not challenge his conviction herein. Thus a reiteration of the substantive facts presented by appellate is unnecessary. Additional factual assertions will attend argument as to whether or not the challenged conditions of sentence are crime related.

III. ARGUMENT

A. THE JUDGMENT AND SENTENCE IS WITHOUT ERROR AND NEED NOT BE CORRECTED.

Eckles argues that the judgment and sentence must be corrected. He argues that the provision incorporating DOC conditions is ambiguous because it refers to neither Appendix F nor Appendix H. This claim is without merit because the trial court clearly incorporated Appendix H from the revised PSI.

Although some confusion was occasioned by the filing of the two PSI, that confusion was addressed and resolved. Nothing in the record allows a reference to Appendix F from the supplanted first PSI. As noted, the trial court adopted Appendix H from the revised PSI as was intended. The trial court's signature appears on Appendix H (CP 54) and not on withdrawn Appendix F (CP 71). Thus conditions proposed in Appendix F cannot be imposed because not adopted by the trial court orally, by

signature, or otherwise. No correction is required.

B. THE CONDITION PROHIBITING PORNOGRAPHIC, SEXUALLY EXPLICIT MATERIAL WAS NOT PRESERVED BELOW AND IS A LAWFUL, CRIME-RELATED CONDITION.

Eckles next claims that the judgment and sentence condition ordering him to "possess/access no pornographic, sexually explicit materials, and/or information pertaining to minors via computer (i.e., internet)" is unconstitutionally vague. But Eckles makes no argument that the similar condition found in Appendix H is similarly infirm. That condition requires that Eckles "shall not own, use, possess or peruse sexually explicit materials without authorization of the Community Corrections Officer." CP 55. This claim is without merit because neither of these conditions is unconstitutionally vague.

In the sentencing context:

> The due process vagueness doctrine under United States Const. amend. 14, § 1 and Const. art. I, § 3 has a twofold purpose: (1) to provide the public with adequate notice of what conduct is proscribed, and (2) to protect the public from arbitrary ad hoc enforcement. However, the constitution does not require "impossible standards of specificity" or "mathematical certainty"

> because some degree of vagueness is inherent in the use of our language. Thus, a vagueness challenge cannot succeed merely because a person cannot predict with certainty the exact point at which conduct would be prohibited.

State v. Riles, 135 Wn.2d 326, 348, 957 P.2d 655 (1998) *overruled in part State v. Valencia,* 169 Wn.2d 782, 792-93, 239 P.3d 1059 (2010). The standard of review is abuse of discretion and sentencing conditions are not presumed to be constitutional. *State v. Valencia,supra*.

Review is de novo on the question of whether or not the trial court had statutory authority to impose a particular condition. *See State v. Coombes, 32806-6-III, 2015 WL 6940150 (Nov., 2015).* If the particular condition was entered with statutory authority, the standard is, again, abuse of discretion. And, "[a]n alleged error involving a trial court's discretion. . .is susceptible to waiver." Id. at paragraph 24 (internal citation omitted). Thus, since Eckles did not object to this condition below, if the trial court had authority to order this type of condition, Eckles failure to object waives the issue. *But see State v. Bahl,* 164 Wn.2d 739, 745, 193 P.3d 678 (2008)(vagueness challenges may be raised for the first time on appeal)

The trial court had authority to order this type of condition (aside from whether or not it is appropriate). RCW 9.94A.505(9) provides in

relevant part that "[a]s a part of any sentence, the court may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter." Further, a "crime-related prohibition" is "an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10). The term "directly relates" means "reasonably related." *State v. Kinzle,* 181Wn.App. 774, 785, 326 P.3d 870 *review denied* 337 P.3d 325 (2014). The condition need not be causally related to the crime. *See State v. Autrey*, 136 Wn.App. 460, 467, 150 P.3d 580 (2006) *citing State v. Letourneau,* 100 Wn.app. 424, 431, 997 P.2d 436 (2000) *accord State v. Acrey,* 135 Wn.App. 938, 946, 146 P.3d 1215 (2006) ("no causal link need be established between the prohibition imposed and the crime committed, so long as the condition relates to the circumstances of the crime.")

Here, Eckles was convicted of sexual misbehavior with two minors, one incident when the victim was as young as twelve. He engaged these minors in drinking alcohol (RP, 2/12/15, 74, 219), provided them with illegal drugs (RP, 2/12/15, 74, 98, 102, 149, 173), and had sex with them. At sentencing, Eckles told the court that he was not totally responsible because he was "aroused, kind of, you know what I mean, induced into doing the things that I've done. . ." RP (3/11/15) 38. Under these circumstances, any condition that restrains Eckles' arousal is clearly

crime-related. The nexus between his arousal, the crimes of conviction, and a condition prohibiting access to or use of sexually explicit materials serves public safety and reduces the risk of reoffending. RCW 9.94A.010(4) and (7)(as quoted in *State v. Bahl, supra* at 768.) With such a nexus, the trial court had authority to impose a condition related to his crime. And, since the trial court had authority, it fell to Eckles to object to the particular condition. He did not and this issue should not be reviewed.

Whether preserved or not, however, this particular provision should not be held to be too vague. In *State v. Bahl, supra,* the Supreme Court struck as vague a condition of sentence that reads, "Do not posses or access pornographic materials, as directed by the supervising Community Corrections Officer." There, the Court cited to a number of state and federal cases so holding. *See, e.g.,* 164 Wn.2d at 756. The condition stumbled because of the difficulty that attends a definition of the term "pornography." At bottom, that word is not amenable to an undebatable definition and thus provides inadequate guidance.

But Bahl also challenged another similar condition the he "not frequent establishments whose primary business pertains to sexually explicit or erotic material." Id. at 743. The Court held that the term "sexually explicit or erotic" is not unconstitutionally vague. These words have clear meanings and are defined in other statutes. Id. at 760. In

concurrence, Justice J.M. Johnson agreed with the majority that the term "sexually explicit" is not too vague. It is defined in RCW 9.68.130, defining the term regarding display that is easily visible to the public, and RCW 9.68A.011(3), defining the term in reasonably direct and comprehensive terms. The term is also used in DOC policy regarding mail to inmates. Id. at 765. The majority relied on *U.S. v. Loy,* 237 F.3d 251 (3d Cir.2001) the concurrence noted that

> In *Loy,* a Fifth Circuit case on which the majority bases a significant portion of its opinion, the court struck down a supervised release condition prohibiting the defendant from possessing " 'all forms of pornography, including legal adult pornography.' ". The Loy court clarified, however, that it "in no way mean[t] to imply that courts may not impose restrictions on the consumption of sexually explicit materials by persons convicted of sex crimes" and that "there is no question that the [court] could, perfectly consonant with the Constitution, restrict [an offender's] access to sexually oriented materials, so long as that restriction was set forth with sufficient clarity and with a nexus to the goals of supervised release."

164 Wn.2d at 767-68. (internal citation omitted). Thus we find that the only possible infirmity in the present case is the use of the vague term "pornography."

But that is not the single operative term in the condition imposed. The trial court prohibited "pornographic, sexually explicit materials." And we have seen that the term "sexually explicit" is not too vague. Eckles is simply not in the same definitional conundrum discussed by the *Bahl*

majority. Should he seek to parse the condition and ask what kind of pornographic material he is prohibited from, he is answered that it is "sexually explicit" material. He is clearly on notice of what is prohibited (sexually explicit pornography). The court and DOC are given definable standards in enforcement of this condition. Moreover, Eckles was on notice of the same condition as stated in Appendix H. CP 55. As modified by the inclusion of the "sexually explicit" limitation, the sentencing condition is not unconstitutionally vague.

Nor should the condition prohibiting information pertaining to minors be found to be too vague. Here, the context of the condition, sentencing a child rapist, is important. The Court in *Bahl* noted that

> In deciding whether a term is unconstitutionally vague, the terms are not considered in a "vacuum," rather, they are considered in the context in which they are used. When a statute does not define a term, the court may consider the plain and ordinary meaning as set forth in a standard dictionary. If "persons of ordinary intelligence can understand what the [law] proscribes, notwithstanding some possible areas of disagreement, the [law] is sufficiently definite.

164 Wn.2d at 754. Moreover, the complained of condition is crime-related in that its obvious intent is to restrict a child rapist from information about children. And its inclusion in the same condition as the prohibition of sexually explicit material adds further context. The sexually explicit material prohibition includes children. The additional phrase makes it clear that not only is he prohibited from child

pornography, he is also restricted from seeking information about children in general.

At bottom, Eckles argument is more a complaint about the scope of the prohibition than it is a complaint about the meaning of the term. Eckles argues that the condition is so broad that it could encompass news articles about high school football or whooping cough. Brief of Appellant at 15-16. This argument cuts against vagueness because it evinces a clear understanding that the prohibition is in fact very broad. Missing, however, is any argument explaining why a child rapist should not be that broadly restricted from anything to do with children. And, it is clear that the condition is not so broad that it restricts all internet use. The SRA policies of public safety and avoidance of recidivism are served by such a broad condition. Eckles knows from this condition that he is not to access any information about children on the internet, including youth sports or youth medical issues.

Thus, the condition is not vague—it is simply very broad. Moreover, either a CCO or a court will be able to easily ascertain whether or not Eckles' internet history includes a foray into areas "pertaining to minors." Given the context of the condition, it is not manifestly unreasonable, easily understood by a person of ordinary intelligence, and amenable to reasonably precise enforcement. Even if properly preserved

below, this provision is not unconstitutionally vague.

C. THE CONDITION PROHIBITING ECKLES FROM BARS OR ESTABLISHMENTS WHERE ALCOHOL IS THE CHIEF ITEM OF SALE WAS NOT OBJECTED TO BELOW AND IS CRIME-RELATED.

Eckles next claims that the condition ordering him to "enter no bar or place where alcohol is the chief item of sale" is infirm as not crime-related. Brief of Appellant at 16. Again, as above, Eckles does not challenge the related condition, found in Appendix H, that he "shall not consume alcohol." CP 56. This claim is without merit because the condition is clearly crime-related. Further, this challenged condition serves to effectuate the more general prohibition that he not consume alcohol.

Again, a crime-related prohibition is subject to trial court discretion and if in fact crime-related does not warrant reversal unless manifestly unreasonable. *State v. Hearn,* 131 Wn.App. 601, 607, 128 P.3d 139 (2006). The condition imposed by Appendix H, consume no alcohol, is in fact found in the SRA. RCW 9.94B. 050(5)(d)(relating to community placement). Thus the single question here is whether or not it is related to the circumstances of the crime being sentenced.

Eckles cites several cases that struck supervision conditions that were not crime-related. Brief of Appellate 17-18. These cases have a single analytical point in common: upon review there was no evidence found that the challenged conditions were crime-related. The present case is quite different. Here, the facts include that: victim KKT had been in and out of rehab for drug issues (RP (2/12/15) 55-56); that KKT drank alcohol with Eckles (Id. at 66); that Eckles and KKT attended a party where "everyone was drinking" (Id. at 74); on several occasions, Eckles provided the victims with drugs (Id. at 98, 102, 149). For his part, Eckles admitted providing drugs (RP (2/12/15) at 173), admitted attending parties where "everyone was consuming drugs and drinking" (Id. at 219), and admitted that he got drunk at one party during which he had sex with KKT (Id. at 226). Clearly, drugs and alcohol helped provide the circumstances under which Eckles was able to commit his crimes. He should be restricted from both illegal drugs and alcohol during community custody.

Given that alcohol prohibitions are authorized by statute and given that there is ample evidence that support the conclusion that that is a crime-related condition in this case, the prohibition on frequenting bars and the like should stand. This particular prohibition serves to effectuate the more general alcohol condition. The point is similar to the status of polygraph testing. Standing alone, and at a CCO's discretion, polygraph

testing is not allowed. *See State v. Flores-Moreno*, 72 Wn.App. 733, 866 P.2d 648 (1994). But

> the Washington Supreme Court's subsequent decision in State v. Riles permits the condition, stating: "Trial courts have authority to require polygraph testing under RCW 9.94A.120(9)(c) [recodified in July of 2001 as RCW 9.94A.505(8)] to monitor compliance with other conditions of community placement."

State v. Vant, 145 Wn.App. 592, 603, 186 P.3d 1149 (2008). Eckles compliance with the general prohibition will be enhanced if he stays out of places whose chief item of sale is prohibited for him.

Restricting Eckles contact with drugs and alcohol is obviously necessary to protect the public. His crimes were done in the context of drug and alcohol abuse. This restriction on his conduct should stand.

D. THE CONDITION PROHIBITING TRACKING DEVICES IS NOT CRIME-RELATED.

Eckles next claims that the condition prohibiting "tracking devices" is not crime-related. Brief of Appellant at 16 *et seq.* The state can find no fact in the record or case analysis allowing a credible argument that this condition relates to anything Eckles did. Eckles did not object below and under *Coombes, supra,* and RAP 2.5 this issue should not be reviewed. If not waived, the state concedes that this condition should be removed.

E. THE TRIAL COURT HAD AUTHORITY TO IMPOSE A CONTRIBUTION TO THE KITSAP COUNTY EXPERT WITNESS FUND, NEITHER THAT ISSUE NOR THE IMPOSITION OF COURT-APPOINTED ATTORNEYS FEES WAS PRESERVED FOR APPEAL, AND THE TRIAL COURT HAD ADEQUATE INFORMATION FROM THE PSI TO SATISFY RCW10.01.160.

Eckles next claims that the trial court erred in assessing various legal financial obligations. Brief of Appellant at 20 *et seq.* This claim is without merit because the issue was not preserved below and because the PSI provided the court with the individualized inquiry required by RCW 10.01.160(3).

1. Authority to impose expert witness fee.

First, Eckles claims that the trial court was without authority to impose an expert witness fee when no expert was called as a witness in the case. Brief of Appellant at 20. He did not object below. That failure should preclude his argument here. RAP 2.5. In any event, this was not a mandatory cost. The state concedes that RCW 10.01.160(2) does not provide such authority. Nor does the SRA authorize this particular cost. However, the state disagrees with Eckles' reading of Kitsap County Code (KCC) chapter 4.84. First, that ordinance establishes a "fund" and is not for the purpose of reimbursing the county

for the use of any particular expert in any particular case. This can be seen in section 4.84.040, which provides for "reasonable compensation to any expert witness who has provided or will provide services to the prosecuting attorney." (emphasis added) Clearly, then, the purpose is not solely for compensation of a particular expert in a particular case but to have a fund in place for any expert services that will arise.

Eckles reading is unworkable. He assumes that this assessment must be in recompense for an expert used in his particular case. The upshot is that on this reading any expert used should await this recompense before she is paid. To the contrary, this ordinance allows the prosecution to retain necessary experts before conviction with the money (presumably paid by other defendants) already in the fund. Moreover, the ordinance contemplates that such money be accrued by court order. KCC 4.84.030. The ordinance thus provides the required statutory authority for the imposition of this cost by the trial court. If Eckles may assert this issue for the first time on appeal, it fails none-the-less.

2. Court-appointed attorney fees.

Eckles also claims that the imposition of public defender fees in the amount of $1,135 is infirm because the record is unclear and because the trial court failed to undertake the individualized inquiry of ability to

pay required by RCW 10.01.160. *See State v. Blazina,* 182 Wn.2d 827, 344 P.3d 680 (2015). This is not a mandatory cost but the trial court has statutory authority by RCW 9.94A.030(31), which provides that legal financial obligation "may include" among other things "court-appointed attorney's fees." Again, this issue is raised for the first time on appeal; there was no objection asserted in the trial court.

First, since the court had express statutory authority for imposing this cost, questions of the court's intent are irrelevant. Further, the term "standard legal financial obligations" was clearly defined to include ""$1,135 court-appointed attorney fee" by the prosecutor in her sentencing argument. RP (3/11/15) 13. The trial court merely adopted the prosecutions recitation in imposing "standard legal financial obligations." The case need not be remanded since the record is clear.

Second, *Blazina* doe not provide *carte blanche* for raising all potential LFO issue for the first time on appeal. "Unpreserved LFO errors do not command review as a matter of right under Ford and its progeny." *Blazina*, 182 Wn.2d at 833 (citing *State v. Ford*, 137 Wn.2d 472, 478, 973 P.2d 452 (1999)). The decision to review is discretionary with the reviewing court under RAP 2.5. *Blazina*, 182 Wn.2d at 835. In other words, *State v. Duncan*, 180 Wn. App. 246, 327 P.3d 699 (2014), remains good law. *Duncan*, 180 Wn. App. at 250, 253 (defendant's failure to

object was not because the ability to pay LFOs was overlooked, rather the defendant reasonably waived the issue, considering "the apparent and unsurprising fact that many defendants do not make an effort at sentencing to suggest to the sentencing court that they are, and will remain, unproductive").

Recently, in the context of a personal restraint petition, the Court of Appeals rebuffed an LFO claim the same as Eckles. *In the Matter of the Personal Restraint of Earl Owen Flippo,* No. 33619-1-III, 2015 WL 7568652 (Filed Nov. 24, 2015). There, the court reviewed the *Blazina* decision and held that "[s]ince *Blazina* imposes no obligation for appellate courts to review LFO challenges raised for the first time on appeal, it therefore follows *Blazina* does not require review of LFO claims made initially in a personal restraint petition—much less one that is untimely filed." Putting aside the personal restraint petition context, the *Flippo* correctly holds that appellate courts are not bound by *Blazina* to consider unpreserved LFO issues. This Court should similarly decline to review this issue.

In *State v. Lazcano,* 188 Wn.App. 338, 354 P.3d 233 (2015), the court reviewed the RAP 2.5 and the purpose of that rule in the context of a double jeopardy claim following a felony murder conviction. The court noted that "[n]o procedural principle is more familiar than that a

constitutional right, or a right of any other sort, may be forfeited in criminal cases by failure to make timely assertion of the right before a tribunal having jurisdiction to determine it" Id. at 355-56. The court went on asserting the reasons for the rule:

> Good sense lies behind the requirement that arguments be first asserted at trial. The prerequisite affords the trial court an opportunity to rule correctly on a matter before it can be presented on appeal. There is great potential for abuse when a party does not raise an issue below because a party so situated could simply lie back, not allowing the trial court to avoid the potential prejudice, gamble on the verdict, and then seek a new trial on appeal. The theory of preservation by timely objection also addresses several other concerns. The rule serves the goal of judicial economy by enabling trial courts to correct mistakes and thereby obviate the needless expense of appellate review and further trials, facilitates appellate review by ensuring that a complete record of the issues will be available, and prevents adversarial unfairness by ensuring that the prevailing party is not deprived of victory by claimed errors that he had no opportunity to address.

Id. at 356 (internal citation omitted). These considerations are particularly vital where, as here, the litigant has knowledge of the rule (*Blazina* was decided well before the present sentencing) and fails to address that issue under circumstances where the trial court could very easily remedy the oversight.

The same principles were applied in *State v. Strine,* 176 Wn.2d 742, 293 P.3d 1177 (2013). There, Strine had been acquitted by a jury on charges of vehicular homicide and vehicular assault. But upon polling it was discovered that the jury was in fact split. Id. at 747-48. The trial

court declared a mistrial. Id. Defense counsel had not objected to the discretionary polling of the jury. Id. In refusing to review the polling issue, the court said "[t]his court has consistently refused to review alleged errors that were not objected to at trial, especially when an objection would have given the trial court an opportunity to correct the error." Id. at 751. In the present case, it is manifest that the trial court could have easily corrected the alleged error had a timely objection brought the issue to the court's attention. In the present case, all the policies supporting the RAP 2.5 limitation apply.

Finally, it should be noted that in this case the trial court had the benefit of individualized information about Eckles' financial situation and work history by receipt of the presentence investigation report. CP 28-29. Even though the trial judge evinced dissatisfaction with that report, it covers the ground mandated by RCW 10.01.160. RP (3/11/15) at 41 ("The PSI that was prepared was , in my mind, worthless.")

On this record, a practical solution may obtain: should this court decide that the above issue regarding possession of tracking gear should be reviewed even though not preserved below, the trial court could easily correct the LFO problem on remand of that issue. This is not to say that the state concedes that either issue should be reviewed; both remain unpreserved.

IV. CONCLUSION

For the foregoing reasons, Eckles's sentence should be affirmed.

DATED December 8, 2015.

Respectfully submitted,

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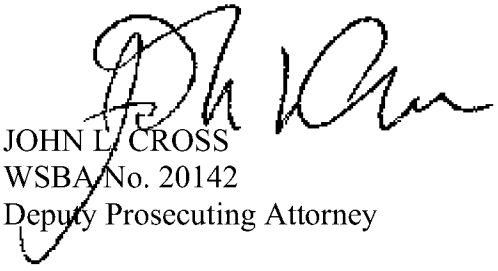
Prosecuting Attorney



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